Hon. John M. Facciola (ret.)
Jonathan M. Redgrave

January 31, 2023

***VIA* EMAIL**

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Facciola – Redgrave Supplemental Personal Submission to Advisory Committee on Civil Rules Regarding Potential Rulemaking Regarding Privilege Logs

Dear Mr. Byron:

We have reviewed the most recent Civil Rules Advisory Committee's proposed amendments to Fed. R. Civ. P. 16(b)(3)(B)(iv) and 26(f)(3)(D) to address what we have previously noted is a persistent problem in civil litigation: the identification and logging of documents withheld on the basis of attorney-client privilege or attorney work-product protections. We also understand from discussions with observers of the January 4, 2023, Standing Committee Meeting that concern was expressed about the length and content of the proposed accompanying Advisory Committee Notes. We write to provide the Advisory Committee with our views with respect to the current draft Rules and Advisory Committee Notes in hopes that our thoughts will assist the Advisory Committee in its additional deliberations regarding the path forward for the proposed rules changes.

As the Advisory Committee is aware, our most recent submission on this subject included our personal reflections on a two-day virtual symposium on the current state of the modern privilege log that we hosted in September of 2021.[1] In that letter, we summarized our conclusion that we perceived a broad (but not universal) consensus that amendments to the privilege rule, Fed. R. Civ. P. 26(b)(5)(A)(ii), and the meet and confer rule, Fed. R. Civ. P. 26(f)(3)(D) could be beneficial and, as such, we recommended they be explored further.

[1] Available at https://www.uscourts.gov/sites/default/files/21-cv-z_suggestion_from_john_facciola_and_jonathan_redgrave_-_privilege_logs_0.pdf.

The current proposal addresses the issues raised via proposed rule changes that do not include any amendment to the privilege rule, Fed. R. Civ. P. 26(b)(5)(A)(ii). We surmise that consternation over proposed language changes to that rule resulted in a "package" of changes to the meet and confer rule (and the parallel Rule 16 provisions) with an extended discussion of the issue in proposed Advisory Committee Notes to achieve the objective of guiding litigants and courts on improving privilege logging practices while honoring the language and intent of the 1993 amendment.

With this context, we respectfully note three observations for the Advisory Committee.

First, the omission of any proposed amendments to Fed. R. Civ. P. 26(b)(5)(A)(ii) itself in the rules package unfortunately fails to address directly the progeny of cases that misapply this rule and axiomatically insist that the rule requires that a party must log each privileged document individually, including courts holding that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances. As we noted previously, such positions are incorrect as well as inconsistent with the 1993 amendment (as clearly stated in the 1993 Advisory Committee Note).

To put a finer point on this observation, we note that the proposed amendments to Rules 16(b) and 26(f) address "the timing and method of complying with Rule 26(b)(5)(A)." Rule 26(b)(5)(A) as it has been put into practice over the last three decades, however, does not fully harmonize with the intended purpose of those provisions to promote flexibility in formulating a method of compliance that meets the scale of discovery and the needs of the case. The framing of Rule 26(b)(5)(A)(i) and the standard set forth in subpart (ii) continue to support a *de facto* default to the traditional, document-by-document privilege logs.[2] That default hinders the parties and the courts from careful and full consideration of alternative methods of compliance.[3] Furthermore, Rule 26(b)(5), as currently written, does not link the Rule to the proposed amendments to Rules 16(b) and 26(f), which could contribute to procedural confusion on the part of both parties and courts and lead to treating those amendments as a *pro forma* box to be checked, not a serious deliberation of the method of compliance.

In short, without addressing Fed. R. Civ. P. 26(b)(5)(A)(ii), we are concerned that changes to the other Rule components (even with extended proposed Advisory Committee Notes) will not achieve the intended objective of improving practice. To this end, we respectfully suggest that

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[2] Courts to this day continue to insist on "document by document" logging notwithstanding the language of the Rule and the Advisory Committee Note to the 1993 Amendments to 26(b)(5). *See, e.g.*, *Metz Culinary Management, Inc. v. OAS, LLC*, 2022 WL 17978793, at *2-3 (M.D. Pa. Dec. 28, 2022) (ordering party "to provide a privilege log asserting any of its objections to each request and as applying to each document, rather than as a general, blanket assertions" and citing multiple third circuit cases for the proposition that "claims of privilege '**must be asserted document by document**, rather than as a single, blanket assertion.'") (citations omitted; emphasis added).

[3] The authors again recognize that the Advisory Committee Note to the 1993 addition of Rule 26(b)(5) indicate that one size does not fit all cases and alternatives, such as categorical logs, might be considered. Experience has taught, and the Advisory Committee's current proposed amendments reflect, that the intent of the 1993 Notes has not been consistently realized in practice.

the Advisory Committee revisit the package and include a modest, neutral addition to Fed. R. Civ. P. 26(b)(5)(A)(ii). Specifically, we believe that an addition of a single sentence after 26(b)(5)(A)(ii) would clarify the intent of the amendments to Rules 16(b) and 26(f) and bring together a holistic and more effective package of rules changes:

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

An Advisory Committee Note to Rule 26(b)(5) need only state that the amendment clarifies that the Rule does not specify the method of compliance for each case which is subject to deliberations of the parties supervised by the court as set forth in Rules 16(b) and 26(f).

As the Advisory Committee will observe, our proposed language above differs from language we previously submitted. In coming to our suggested language in this letter, we revisited concerns raised in various submissions that proposed changes to this rule could negatively impact the discovery process in employment cases and other circumstances. With these perspectives in mind, we crafted language that we submit is neutral and should address the concerns previously raised.[4]

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[4] We commend the Advisory Committee to consider how the Southern District of New York joins the issue of Rule 26(b)(5)(A) compliance with Local Civil Rule 26.2(c) (echoing the proposed amendments and notes to Rules 16(b) and 26(f)), which provides:

> Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.

S.D.N.Y. Local Civ. R. 26.2(c). The Committee Note to the Local Rule expands on purpose as follows:

> With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court. There is a growing literature in decisions, law reviews, and other publications about the need to handle privilege claims in new and more efficient ways. The Committee wishes to encourage parties to cooperate with each other in developing efficient ways to communicate the information required by Local Civil Rule 26.2 without the need for a traditional privilege log. Because the appropriate approach may differ depending on the size of the case, the volume of privileged documents, the use of electronic search techniques, and other factors, the purpose of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case. The guiding principles should be cooperation and the "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. *See also* The Sedona Cooperation Proclamation, available at www.TheSedonaConference.org, whose principles the Committee endorses.

We also respectfully submit that if the Advisory Committee proposes a change to Fed. R. Civ. P. 26(b)(5)(A)(ii) (with a short Advisory Committee Note), then it is likely that proposed Advisory Committee Notes accompanying the proposed amendments to Fed. R. Civ. P. 16(b)(3)(B)(iv) and 26(f)(3)(D) can be reduced.

Second, if the Advisory Committee concludes that it should not propose amending Fed. R. Civ. P. 26(b)(5)(A)(ii), we are concerned that any significant truncation of the proposed Advisory Committee Notes accompanying the present set of proposed rules changes will eviscerate the intended effect of the changes to improve practice. As such, we urge caution with reducing the proposed Advisory Committee Notes simply for the sake of reduction, although we also believe some of the language should be eliminated to reduce the potential for unintended consequences as noted below.

Third, we believe that the proposed Advisory Committee Notes to the Rules 16(b) and 26(f) amendments should be modified slightly as they relate to four specific subjects:

a. Timing of the 26(f) Conference Privilege Log Deliberation and 16(b) Case Scheduling and Management Order

The authors agree that the parties should address the method of compliance with Rule 26(b)(5)(A) early, in part, to mitigate disputes later in the case. Early court involvement similarly can put the court on notice of current and potential disputes that can be resolved more expeditiously by early supervision than subsequent disputes that often are encumbered by disagreements concerning the record pertaining to agreed-upon compliance methods or the parties' differing expectations. The parties, however, may have limited knowledge at the time of the Rule 26(f) discovery conference regarding the full scope of discovery and the probable number of claims of privilege and protection that may be asserted. The assumption that producing parties "know" the size, scope, and the precise character of likely privilege and protection claims also is unwarranted, particularly in complex, document intensive litigation. We therefore recommend that the Advisory Committee Notes indicate that the parties address the method of compliance based upon currently known information and the reasonably anticipated number and type of claims that may be asserted as well the means of communicating protected material.[5] In addition, because the parties might not have sufficient information to propose meaningful methods at the Rule 26(f) conference, the Advisory Committee Note should acknowledge that the parties (and court) can defer deliberations on the privilege issues until later in the case within a time period specified in the Case Scheduling and Management Order.

Id., Committee Note; *see also* Sedona Elec. Doc. Prod. Principles, Comment 10.h. ("Logging large volumes of withheld ESI is often costly, burdensome, time-consuming, and disproportionate to the needs of the case." (citing 1993 Advisory Comm. Note to Rule 26(b)(5)).

[5] Some communication platforms, e.g., emails and email strings and threads, present difficult logging issues which should be addressed and resolved to reduce the prospect of later disputes.

b. Continuous Monitoring and Disclosures

Discovery evolves in the course of litigation, and producing parties may find that there are particular fact-intensive and legally difficult claims of privilege and protection, about which reasonable minds could differ, that were not initially anticipated. The authors recommend that Advisory Committee Notes reflect that the parties and the court re-visit the compliance method in a timely manner as discovery proceeds and modify the method if the needs of the case so require. Effective monitoring will require the producing claimant to disclose unanticipated compliance problems and privilege issues and receiving parties to identify with particularity issues they may have encountered. We concur with the emphasis in the proposed Advisory Committee Notes that re-enforces the intent that the parties cooperate and resolve compliance method issues without unnecessary disputes and seek the court's assistance and guidance when unable to do so.

c. Limiting Practice Guidance in Committee Notes to Rule 26(f)(3)(D)

The currently proposed Committee Notes to the Rule 26(f)(3)(D) amendment include various alternatives to the traditional document-by-document log. The authors recommend limiting those references because the suggestions may constrain the parties and the court in devising compliance methods that meet the needs of the case. The parties and the court may invent methods that exclude some categories of documents from the log or altogether exclude the need for a privilege log. Furthermore, the pace of advances in technology, including privilege artificial intelligence and privilege classifier tools, also makes anticipating alternative compliance methods speculative.

d. Addressing Materiality in the Committee Notes to Rule 26(f)(3)(D)

In our experience, the vast majority of items withheld as privileged or trial-preparation materials are immaterial to the resolution of a claim or issue in the case. Challenges to claims are thus often a waste of the time, effort, and resources of the parties and the court as they do not move the matter closer to resolution. The authors recommend that the Advisory Committee consider including in the Committee Notes language that the parties and court address possible methods to focus compliance on the documents or information that have the highest likelihood of being material to the underlying dispute. An example is tiered discovery that places priority on initially producing documents from sources that are more likely to be material to the claims and defenses. Withheld documents in this subgroup, or a sample, could be subject to a more detailed method of compliance to assess whether claims are properly asserted and increase the prospects of employing more efficient and effective compliance methods for less important discovery tiers.

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In short, we believe that the proposed amendments and Advisory Committee Notes are meaningful steps to advance the purposes of Rule 26(b)(5)(A) and can help reduce the burdens and delays imposed by traditional privilege logs, as well as reduce unnecessary and largely

fruitless challenges to the method of compliance and broad challenges to claims. We also respectfully submit, based on our judicial and legal practice experience, that the additional minor amendment to Rule 26(b)(5)(A) we propose herein, and additions and modifications we suggest with respect to the proposed Advisory Committee Notes accompanying the changes to Fed. R. Civ. P. 16(b)(3)(B)(iv) and 26(f)(3)(D), can further enhance the likelihood that the amendments will achieve these worthy objectives.

Thank you for considering our personal observations and suggested amendments. And, finally, we would be remiss if we did not thank you again for the continued dedication of time and attention to these proposed rule amendments.

/s/

John M. Facciola

/s/

Jonathan M. Redgrave